

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

Office-Supreme Court,
FILED

JUN 10 1948

CHARLES ELMORE CROFT
CLERK

No. 118 86

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,

v.

**CIVIL AERONAUTICS BOARD, AND NATIONAL AIR
LINES, INC.,**

Respondents

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA**

✓ **HENRY KAISER,**
✓ **GERHARD P. VAN ARKEL,**
1830 Jefferson Place, N. W.,
Washington 6, D. C.,
Counsel for Air Line Pilots
Association, International.

Of Counsel:

✓ **DANIEL D. CARMELL,**
130 N. Wells Street,
Chicago, Illinois;
✓ **SAMUEL H. JAFFEE,**
Dupont Circle Building,
Washington 6, D. C.



SUPREME COURT OF THE UNITED STATES

DOCTORS TERM 1901

100

IN THE SUPREME COURT OF THE UNITED STATES
1901

THE UNITED STATES OF AMERICA
vs.
JAMES H. HANCOCK

APPEAL FROM THE DISTRICT COURT OF THE DISTRICT OF COLUMBIA

JOHN W. HANCOCK, ATTORNEY AT LAW, FOR PLAINTIFF

AND
JAMES H. HANCOCK, ATTORNEY AT LAW, FOR DEFENDANT

WITNESSETH

That the following is a true and correct copy of the original
as the same appears in the records of the Court

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,

v.

CIVIL AERONAUTICS BOARD, AND NATIONAL AIR
LINES, INC.,
Respondents

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA**

*To the Honorable the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

Air Line Pilots Association, International, prays that a writ of certiorari issue to review the Judgment and Decree of the United States Court of Appeals for the District of Columbia, entered on April 23, 1948, insofar as the Judgment and Decree dismissed petitioner's petition for review of an order of the Civil Aeronautics Board, dated March 29, 1948.

Opinions Below

The court below rendered no opinion other than the said Judgment and Decree of April 23, 1948 (R. 96). The

order of the Civil Aeronautics Board which petitioner sought to have reviewed is as yet unreported. It appears in the record at page 25.

Jurisdiction

The jurisdiction of this Court is invoked under Section 1006 (f) of the Civil Aeronautics Act of 1938, as amended (52 Stat. 977, 49 U. S. C. A. Supp. sec. 646 (f)), Section 240 (a) of the Judicial Code, as amended (28 U. S. C. A. sec. 347 (a)), and Rule 38, paragraph 5 (c) of the Court.

Statutes and Regulations Involved

The pertinent provisions of the Civil Aeronautics Act of 1938, as amended (52 Stat. 977, 49 U. S. C. A. Supp. sec. 401 *et seq.*), are set forth in the Appendix, *infra*, pages 11-12.

The pertinent provisions of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. A. Supp. sec. 1001 *et seq.*), are set forth in the Appendix, *infra*, pages 12-13.

The pertinent provisions of the Railway Labor Act (49 Stat. 1189, 45 U. S. C. A. Supp. sec. 151 *et seq.*), are set forth in the Appendix, *infra*, pages 13-14.

The pertinent provisions of the Civil Aeronautics Board's Economic Regulations (Part 285 of its Rules of Practice), are set forth in the Appendix, *infra*, pages 14-15.

Question Presented

1. Whether petitioner has, under the Civil Aeronautics Act, disclosed a "substantial interest" in, or, under the Administrative Procedure Act, is a person "suffering legal wrong" or is "adversely affected or aggrieved" by, the order of the Civil Aeronautics Board which petitioner sought to review in the court below.

Statement

The proceedings in the court below began with a petition filed on April 5, 1948, by Air Line Pilots Association, Inter-

national (Association) (R. 1), a labor organization representing pilots employed by National Air Lines, Inc. (National), seeking review and stay of an order of the Civil Aeronautics Board (Board) (R. 25), which granted to National a "temporary mail rate" including a retroactive award of public monies amounting to \$545,000 and further increased compensation of approximately \$60,000 per month.

The proceedings which led to the order referred to may be summarized as follows: On October 31, 1947, National filed with the Board, an administrative agency of the Federal Government, a supplemental petition for a "temporary mail rate" (R. 17). On January 23, 1948, certain of National's employees, represented by the International Association of Machinists, a labor organization, went on strike (R. 19). On January 30, 1948, the Board denied National's petition (R. 18). On February 2, 1948, National filed a petition with the Board for reconsideration; this petition referred to the strike as a reason for asking for the "temporary mail rate" (R. 18, 35). On February 3, 1948, certain of National's pilots, represented by the Association, went on strike (R. 19). On February 9, 1948, National filed an amended petition deleting any reference to the strike (R. 25). On February 24, 1948, the Board issued an order "directing National to show cause why a proposed temporary rate should not be established" (R. 18-19).¹

On March 1, 1948, the Association, in its own behalf as a labor organization having contractual relations with National, in behalf of its pilot members who were (and still

¹ Under the Board's procedure set out in its Economic Regulations, sec. 285.13(b) (1) and (2), it is provided that "In proceedings instituted upon petition . . . , the Board, before further procedural steps are taken, will normally issue an order directing the parties to show cause why specified rates . . . should not be fixed and determined by the Board"; it is further provided that "The rates . . . specified in any order issued pursuant to this section will represent tentative rates. . . ."

are) engaged in the strike referred to, and in behalf of the public, petitioned the Board (R. 19) for leave to intervene in the "temporary mail rate" proceedings.

The Board, by its Opinion and Order of March 5, 1948 (R. 18), denied the Association the right to intervene, though permitting it "to participate", subject, however, to prescribed limitations placed by the Board upon the issues and the evidence the Association sought and offered to adduce. These limitations, as described by the Board in its said Opinion and Order of March 5, 1948 (and adopted by it in the subsequent proceedings before the Board referred to hereinafter), were principally based on the Board's assertion therein that in "temporary" rate proceedings "compliance with substantive and procedural statutory requirements [is] impossible . . ."; that there are "only two requirements that must be met to entitle a carrier to a temporary rate . . . [1] that its immediate financial position is critical [and (2)] that its existing rate is substantially inadequate"; that "substantial reliance must necessarily be placed on the data submitted by the [airline; and that] the emphasis [must be placed] on speedy determination [and] on estimates . . ."

Such limitations, as alleged by the Association below, necessarily resulted not only (1) in complete abandonment by the Board of the "substantive and procedural statutory requirements" provided by the Civil Aeronautics Act, and which must be applied by the Board in the determination of mail rates, but in addition (2) in abandonment by the Board of the principles of fair hearing and due process required by said Act, by the Board's Economic Regulations, by the Administrative Procedure Act, and by the Constitution of the United States.

The said *substantive* statutory requirements principally consist of: (a) public interest, convenience and necessity (Civil Aeronautics Act, secs. 2 and 401(d)(1)); (b) compli-

ance by the airline with title II of the Railway Labor Act (Civil Aeronautics Act, sec. 401(1)(4)); and (c) need by airline for adequate mail-rate compensation "under honest, economical, and efficient management" (Civil Aeronautics Act, secs. 406(b) and 1002(e)(5)).

The chief *procedural* statutory requirement and principle of fair hearing violated by the Board involves sec. 285.13 (b)(2) of the Board's Economic Regulations,² and sec. 8(b) of the Administrative Procedure Act.³ Nowhere in any of its orders or decisions did the Board incorporate the exhibits referred to or include a statement of the reasons or basis for its findings and conclusions upon the material issues, nor have such exhibits ever been made available to the Association or seen by it.

Following a purported "hearing" which was thus limited (to all of which, and to the denial of intervention, the Association duly objected) the Board by its order of March 29, 1948 (R. 25), granted a "temporary mail rate" to National, increasing by approximately \$60,000 per month the sums to be received by National for the carriage of mail, and also granted to National a retroactive award of \$545,000. This order was a complete reversal of the earlier order of the Board issued January 30, 1948, only three weeks before, which had denied National's petition for a temporary mail rate.

On April 5, 1948, as stated above, the Association filed a petition seeking review and stay of the Board's order of March 29, alleging therein the substance of the above. On April 8, the Board filed objections to the request for stay,

² ". . . Such orders [setting rates] will be accompanied by and incorporate exhibits setting forth the basis upon which the tentative rates . . . have been formulated."

³ ". . . All decisions (including initial, recommended, or tentative decisions) shall . . . include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record. . . ."

and, on April 9, a motion to dismiss the petition (R. 1, 5, 30). On April 14, the Association filed a reply to the objections (R. 34). On April 21, oral argument on these documents was had before the court below. On April 23, the court below issued a Judgment and Decree denying the petition for stay, and granting the motion to dismiss "for failure by petitioner to disclose a substantial interest in the order sought to be reviewed" (R. 96).⁴

Specification of Errors to Be Urged

The Court below erred:

1. In dismissing the Association's petition for review assertedly "for failure by petitioner to disclose a substantial interest in the order sought to be reviewed", and in failing to find that such interest was disclosed, under the Civil Aeronautics Act, sec. 1006 (a).
2. In failing to find that the Association was a person "suffering legal wrong" and one "adversely affected or aggrieved" by the Board's order of March 29, 1948, within the meaning of the Administrative Procedure Act, sec. 10 (a).

Reasons for Granting the Writ

1. The issue here involved raises a substantial question directly affecting the public interest. The Civil Aeronautics Act is clearly designed principally to protect the public interest (see sec. 2, Appendix, page 11; *W. R. Grace & Co. v.*

⁴ Since the court below based its Judgment and Decree solely on the asserted failure to disclose the substantial interest referred to, no reference is made herein to the issue of whether the Board's order, review of which was sought in the court below, was a final order; that issue was raised below, but is clearly not before us in the present posture of the case.

Civil Aeronautics Board, 154 F. 2d 271 (C. C. A. 2)). Courts will go farther to protect the public interest than they are accustomed to go when only private interests are involved. *Virginian Ry. Co. v. System Federation*, 300 U. S. 515, 552; *FCC v. Sanders Bros. Radio Station*, 309 U. S. 470, 476-7; *Scripps-Howard Radio v. FCC*, 316 U. S. 4, 15-18; *American Power & Light Co. v. FCC*, 325 U. S. 385, 390-1. As the Second Circuit, commenting upon the *Sanders* and *Scripps-Howard* cases, said (In *Associated Industries of New York v. Ickes*, 134 F. 2d 694, 704): “. . . Congress can constitutionally enact a statute conferring on any non-official person . . . authority to bring a suit to prevent action by an officer in violation of his statutory powers . . . even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private Attorney Generals.”

The Civil Aeronautics Act, sec. 1006 (a) says that “Any order [with an exception not here pertinent] shall be subject to review . . . upon petition . . . by any person disclosing a substantial interest in such order . . .” The Administrative Procedure Act, sec. 10 (a) says that, “Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action, within the meaning of any relevant statute, shall be entitled to judicial review thereof.”⁵ Under sec. 285.6 (b) of the Board’s Economic Regulations, it appears that petitions for intervention will generally be granted where the petitioner has a “property or financial interest” (Appendix page 14). It has been stated hereinabove that the Civil Aeronautics Act (sec. 401 (1) (4)) makes it a condition

⁵ Under sec. 1(27) of the Civil Aeronautics Act, a person includes “any association . . .”; sec. 2(b) of the Administrative Procedure Act is to the same effect.

upon the holding of a certificate of public convenience and necessity that the airline comply with the labor legislation referred to in title II of the Railway Act. The rights granted the Association under the Railway Act have been recognized by this Court as valuable constitutional and property rights. *Texas & N. O. Ry. Co. v. Bro. of Ry. & SS. Clerks*, 281 U. S. 548, 571.

2. It is not necessary for a person, in order to be "adversely affected or aggrieved", for such person to be a competitor as that term is more commonly understood. One may be so affected or aggrieved in other ways. The relationship of the Association to National and to the proceedings was not that of a stranger, nor that of a taxpayer, nor of some other person whose connection with the proceedings is insubstantial, indirect, or remote.⁶ In this instance, the effect of the Board's order in granting National a temporary mail rate is that the power of the government has been injected into an economic contest between a labor organization and an employer, on the side of one contestant, and that this has been done by resort to a procedure which is illegal, arbitrary, and capricious. Clearly, the monies unlawfully awarded by the Board to National (which in one year will total well over a million dollars)⁷ will be of mate-

⁶ For example, as in the cases of *Perkins v. Lukens Steel Co.*, 310 U. S. 113; *Mass. v. Mellon*, 262 U. S. 447; see also other decisions summarized in the Reply to Objections to Stay of Order (R. 34, 43-46).

⁷ We are informed that some \$400,000 or more has already been paid, and that \$60,000 of increased compensation will continue to be paid monthly—unless the Board's procedure is held invalid.

rial assistance to National in this economic contest. Those familiar with the dynamics of such contests know full well that such a strengthening of one side works a weakening of the other, for the outcome of such contests generally depends upon the relative economic strength of the participants. The Association is, under the circumstances, at least "adversely affected or aggrieved." This is especially true where, as here, it is the public interest which is primarily involved and not mere private litigation. See the *Sanders*, *Scripps-Howard*, *Associated Industries*, *Grace*, and *American Power & Light Co.* cases referred to above. The dismissal by the court below of the Association's petition for review is in conflict with the decisions of the Second Circuit cited above, and the court below has not given proper effect to the *American Power & Light* and other decisions of this Court.

3. To deny judicial review on the facts set out would have these pernicious results: (a) there could be no review by anyone of an order which the Association asserts is illegal, arbitrary, and capricious; (b) the Board will have given away thousands of dollars of public monies because of the application of standards of the Board's own creation—standards which clearly conflict with those laid down by Congress; (c) the Board's refusal even to consider evidence that National violated the Railway Act means that the government rewards the law breaker, while, at the same time, it punishes the public and the Union, who desire the law upheld; and (d) the refusal even to consider evidence that National is not conducting its business honestly, economically, and efficiently, means that a carrier guilty of even the grossest dishonesty is nevertheless rewarded by the government.

Conclusion

WHEREFORE, petitioner respectfully prays that this petition be granted.

Respectfully submitted,

HENRY KAISER,
GERHARD P. VAN ARKEL,
*1830 Jefferson Place, N. W.,
Washington 6, D. C.,
Counsel for Air Line Pilots
Association, International.*

Of Counsel:

DANIEL D. CARMELL,
*130 N. Wells Street,
Chicago, Illinois;*
SAMUEL H. JAFFEE,
*Dupont Circle Building,
Washington 6, D. C.*

June, 1948.

APPENDIX

Civil Aeronautics Act of 1938 as Amended

The pertinent provisions of the Civil Aeronautics Act of 1938, as amended, 52 Stat. 977, 49 USCA Supp. sec. 401 et seq., are as follows:

SEC. 1. [DEFINITIONS] As used in this Act, unless the context otherwise requires—

.

(27) "Person" means any . . . association . . .

SEC. 2. [DECLARATION OF POLICY] In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

.

(c) The promotion of adequate, economical, and efficient service by air carriers . . .

SEC. 401(d)(1). [CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY] The Board shall issue a certificate authorizing the . . . transportation covered by the application, if it finds that the applicant is fit, willing, and able to . . . conform to the provisions of this Act . . . and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

SEC. 401(l)(4). [Compliance with Labor Legislation] It shall be a condition upon the holding of a certificate by any air carrier that such carrier shall comply with title II of the Railway Labor Act, as amended.

SEC. 406(b). [RATES FOR TRANSPORTATION OF MAIL] In fixing and determining fair and reasonable rates of compensation under this section, the Board . . . shall take into consideration, among other factors, . . . the need of each such air carrier for compen-

sation for the transportation of mail sufficient . . .
to enable such air carrier under honest, economical, and
efficient management, to maintain and continue the
development of air transportation . . .

SEC. 1002(e). [COMPLAINTS TO AND INVESTIGATIONS BY
THE BOARD. Rule of Rate Making] In exercising and
performing its powers and duties with respect to the
determination of rates for the carriage of persons or
property, the Board shall take into consideration,
among other factors—

.

(5) The need of each air carrier for revenues suffi-
cient to enable such air carrier, under honest, economi-
cal, and efficient management, to provide adequate and
efficient air carrier service.

SEC. 1006(a). [JUDICIAL REVIEW] Any order, affirm-
ative or negative, issued by the Board under this Act
[with an exception not here pertinent] shall be subject
to review by . . . the United States Court of Ap-
peals for the District of Columbia upon petition . . .
by any person disclosing a substantial interest in such
order . . .

SEC. 1006(f). The judgment and decree of the court
affirming, modifying, or setting aside any such order
of the Board shall be subject only to review by the Su-
preme Court of the United States upon certification or
certiorari as provided in sections 239 and 240 of the
Judicial Code.

Administrative Procedure Act

The pertinent provisions of the Administrative Pro-
cedure Act, 60 Stat. 237, 5 USCA Supp. sec. 1001 et seq.,
are as follows:

SEC. 2. [DEFINITIONS] As used in this Act—

.

(b) * * * "Party" includes any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding * * *

SEC. 8. [DECISIONS] * * * (b) * * * All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record * * *

SEC. 10. [JUDICIAL REVIEW] Except as far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) * * * Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

Railway Labor Act

The pertinent provisions of the Railway Labor Act, 49 Stat. 1189, 49 USCA sec. 151 et seq., are as follows:

SEC. 201. [TITLE II; COMMON CARRIERS BY AIR; APPLICATION TO COMMON CARRIERS BY AIR] All of the provisions of title I of this Act, except the provisions of section 3 thereof, are extended to and shall cover every common carrier by air engaged in interstate and foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers * * *

SEC. 202. [EXTENT OF APPLICABILITY OF TITLE I TO AIR CARRIERS] The duties, requirements, penalties, benefits, and privileges prescribed and established by the provisions of title I of this Act, except section 3 thereof, shall apply to said carriers by air and their employees

in the same manner and to the same extent as though such carriers and their employees were specifically included within the definition of "carrier" and "employee", respectively, in section 1 thereof.⁸

Economic Regulations

The pertinent provisions of the Civil Aeronautics Board's Economic Regulations (Part 285 of its Rules of Practice) are as follows:

285.6 APPEARANCES BY THIRD PERSONS AND FORMAL INTERVENTIONS

.

(b) Formal Interventions.

(1) Any person having a substantial interest in the subject matter of any proceeding may petition for leave to intervene in such proceeding and may become a party thereto upon compliance with the provisions of this paragraph. In general, such petitions will not be granted unless it shall be found:

(i) that such person has a statutory right to be made a party to such proceeding; or

(ii) that such person will or may be bound by the order to be entered in the proceeding; or

(iii) that such person has a property or financial interest which may not be adequately represented by existing parties, if such intervention would not unduly broaden the issues or delay the proceeding . . .

⁸ The principal provisions of title I which National allegedly violated are: *Sec. 1, First* (duty "to exert every reasonable effort to make and maintain agreements, rates of pay, rules, and working conditions, and to settle all disputes . . ."); *Second* (disputes to "be considered, and, if possible, decided, with all expedition, in conference between" carrier and Union); *Fourth* ("Employees shall have the right to organize and bargain collectively through representatives of their own choosing"); and *Sixth* (duty to confer with other party in case of labor dispute).

285.13 PROCEDURE IN RATE PROCEEDINGS

• • • • •

• • • (b) Order setting tentative rates, fares or charges.

(1) In proceedings instituted upon petition or complaint, the Board before further procedural steps are taken, will normally issue an order directing the parties to show cause why specified rates, fares, or charges set out in such order should not be fixed and determined by the Board.

(2) The rates, fares, or charges specified in any order issued pursuant to this section will represent tentative rates, fares, or charges which appear to the Board to be fair and reasonable on the basis of the carrier's monthly and annual reports and other information available to the Board. Such orders will be accompanied by and incorporate exhibits setting forth the basis upon which the tentative rates, fares, or charges have been formulated.

(6643)

INDEX

	Page
Opinions below.....	1
Jurisdiction.....	1
Question presented.....	2
Statutes involved.....	2
Statement.....	2
Argument.....	6
Conclusion.....	18
Appendix:	
Civil Aeronautics Act of 1938, as amended.....	19
Administrative Procedure Act, Sec. 10 (a).....	20

CITATIONS

Cases:	
Alabama Power Co. v. Ickes, 302 U. S. 464.....	8, 17
Associated Industries v. Ickes, 134 F. 2d 694.....	14
American Lecithin Co. v. McNutt, 155 F. 2d 786, certiorari denied, 329 U. S. 763.....	14
American Power & Light Co. v. Securities and Exchange Commission, 325 U. S. 385.....	14
Helsering v. Gowran, 302 U. S. 238.....	18
Interstate Electric, Inc. v. Federal Power Commission, 164 F. 2d 485.....	7
Langnes v. Green, 282 U. S. 531.....	18
LeTulle v. Scofield, 308 U. S. 415.....	18
L. Singer & Sons v. Union Pacific R. R. Co., 311 U. S. 295.....	8
Okin v. Securities and Exchange Commission, 143 F. 2d 943.....	7
Yankee Network v. Federal Communications Commission, 107 F. 2d 212.....	7

Statutes:

Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. 1001, et seq.:	
Sec. 9.....	10
Sec. 10.....	16, 17, 20
Civil Aeronautics Act of 1938 (52 Stat. 973), as amended, Reorg. Plan No. IV, Sec. 7, 5 Fed. Reg. 2421, 54 Stat. 1235, 49 U. S. C. 401 et seq.:	
Sec. 401.....	10, 15, 16
Sec. 402.....	15
Sec. 406.....	8-12, 17, 19
Sec. 408.....	15
Sec. 1006.....	6, 14, 20

Miscellaneous:

Hearings, House Committee on the Judiciary, on Federal Administrative Procedure, 79th Cong., 1st Sess. p. 38..	16
S. 7, 79th Cong., 1st Sess.....	16
S. Rep. 752, 79th Cong., 1st Sess., p. 44.....	16, 17

23071

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 86

**AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
PETITIONER**

v.

**CIVIL AERONAUTICS BOARD AND NATIONAL AIR-
LINES, INC.**

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA**

**BRIEF FOR THE CIVIL AERONAUTICS BOARD
IN OPPOSITION**

OPINIONS BELOW

The court below rendered no opinion other than its judgment and decree of April 23, 1948 (R. 96). The findings and order of the Civil Aeronautics Board (R. 25-30) are not yet reported.

JURISDICTION

The decree of the court below was entered on April 23, 1948 (R. 96). The petition for a writ

of certiorari was filed June 10, 1948. The jurisdiction of this Court is invoked under Section 1006 (f) of the Civil Aeronautics Act of 1938, 49 U. S. C. 646 (f), and under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether petitioner disclosed a "substantial interest" in the order of the Civil Aeronautics Board which it sought to have reviewed, as required for the judicial review authorized by Section 1006 (a) of the Civil Aeronautics Act of 1938, or showed itself to be a person suffering "legal wrong" or "adversely affected or aggrieved" by such order, within the meaning of Section 10 (a) of the Administrative Procedure Act.

STATUTES INVOLVED

The pertinent provisions of the Civil Aeronautics Act of 1938 (52 Stat. 973), as amended (49 U. S. C. 401 *et seq.*) and of Section 10 (a) of the Administrative Procedure Act (60 Stat. 243, 5 U. S. C. 1009 (a)) are set forth in the Appendix, *infra*, pp. 19-20.

STATEMENT

On April 5, 1948, petitioner filed in the court below a petition for review and for a stay of an order issued by the Civil Aeronautics Board on March 29, 1948, allowing a temporary increase in

the rates for the transportation of mail by aircraft by National Airlines, Inc., which will be referred to herein as National. The petition alleged that petitioner is a labor organization having contractual relations with National on behalf of petitioner's pilot members and that its members are engaged in a strike against National (R. 1-2).¹ The only further allegation made concerning petitioner's interest in the order was that one of petitioner's "points" will be that the Board erred in not permitting it to intervene in the proceeding to determine a temporary mail rate for National—

for the reason that petitioner has a "substantial interest" therein within the meaning of the Civil Aeronautics Act (Section 1006 (a)), and is a person "suffering legal wrong" and is "adversely affected or aggrieved" within the meaning of the Administrative Procedure Act (Section 10 (a)) (R. 3).

The Board promptly filed objections to the petition for a stay (R. 5-17) and a motion to dismiss the petition (R. 30). The grounds of the motion to dismiss were (1) that petitioner had not disclosed that "substantial interest" in the order which is requisite to the review authorized by Section 1006 (a) of the Civil Aeronautics Act, and

¹ Petitioner's answer to the Board's motion to dismiss alleges that the pilot members went on strike on February 3, 1948 (R. 35).

(2) that the Board's order is not final and therefore is not subject to judicial review (R. 30). National filed a motion for leave to intervene and a proposed motion to deny a stay and to dismiss the proceeding (R. 31-32, 63-64).

The court below, after hearing argument, entered a judgment dismissing the petition for review "for failure by petitioner to disclose a substantial interest in the order sought to be reviewed" (R. 96). The judgment also granted National's motion for leave to intervene and to file a motion to deny a stay and to dismiss (*ibid.*).

Prior to the Board's temporary rate order which the petitioner is attacking, there were the following proceedings:

On July 14, 1947, National filed a petition with the Board for an increase in its permanent mail rate (R. 68). It later filed a supplemental petition requesting a temporary mail rate and, after this had been denied, it filed on February 2, 1948, a petition for reconsideration alleging new matters (R. 17-18). On February 24, the Board issued an order directing National to show cause why a proposed temporary rate should not be established (R. 18-19). On March 2, petitioner and the International Association of Machinists filed petitions for leave to intervene in this proceeding and also filed objections to the order to show cause (R. 19-20). One such objection was that National's financial need was attributable to its unlawful conduct in its relationship with its em-

ployees and to the resulting strikes (R. 20). The Board on March 5 denied leave to intervene but allowed petitioner and the Association of Machinists to introduce evidence and to cross examine witnesses with respect to the issues which the Board regarded as open in the temporary rate proceeding (R. 23-24).²

Hearing on the proposed temporary rate, which was set for March 8, was twice postponed at the request of petitioner and over the objection of National and public counsel (R. 71). When the hearing was held on March 18 and 19, petitioner and the International Association of Machinists both participated (R. 26).³ The order which the

²The opinion of the Board denying intervention states that the rate proposed in the Board's show cause order "was not intended to reflect any decreases in traffic which were occasioned or may be occasioned by the strikes" of National's employees (R. 23). The Board also said that National's existing mail rate gives it "a lower mail pay yield per revenue plane mile than any other air carrier" (R. 24).

³Petitioner has implied (Pet. 5) that the evidence upon which the Board relied in fixing a temporary rate was not made available to petitioner. That this was not the case is shown by the Board's order of March 12, 1948, Serial No. E-1284, denying petitions for reconsideration of its order of March 5, 1948, which had denied leave to intervene. The Board in this order, which was not incorporated in the record in this case, made the following findings, among others:

1. The final decision on the temporary rate which may be fixed in this proceeding will be based entirely upon data and material submitted at the hearing or incorporated by reference in the record in this proceeding;
2. Public Counsel has furnished counsel representing

Board entered on March 29, 1948, allowing a temporary increase in the rates for transportation of mail by National, states, among other things, that "the adequacy of National's present mail rate and its operating need have been measured independently of the effects of the current strike of its employees, and the rate established herein is based upon normal operating trends" (*ibid.*).

ARGUMENT

I

Section 1006 (a) of the Civil Aeronautics Act (*infra*, p. 20) provides that a petition for review of an order of the Board may be filed by "any person disclosing a substantial interest in such order." The question here is whether a labor union representing employees of an air carrier has standing to assail an order of the Civil Aeronautics Board granting increased mail pay compensation to the carrier.

A. When judicial review is sought of an order of an administrative agency, the petition for review must set forth facts which, if true, show the peti-

petitioners, the Post Office Department, and National Airlines, Inc., copies of testimony which, together with the material incorporated by reference in the record, will constitute Public Counsel's affirmative case in this proceeding;

3. All basic data and information in the Board's public files which will be incorporated by reference in the record in this proceeding has been and will continue to be available to petitioners;

tioner's standing to maintain its action and a petition which is insufficient in this respect must be dismissed. *Yankee Network v. Federal Communications Commission*, 107 F. 2d 212, 224 (App. D. C.); *Okin v. Securities and Exchange Commission*, 143 F. 2d 943 (C. C. A. 2); *Interstate Electric, Inc. v. Federal Power Commission*, 164 F. 2d 485 (C. C. A. 9). Here, the petition for review (R. 1-5) does not allege any facts showing injury to petitioner by reason of the order sought to be reviewed or that petitioner had any interest, substantial or otherwise, in this order. To allege the legal conclusion that petitioner has a "substantial interest" in the order without alleging any supporting facts, is not sufficient, *Interstate Electric, Inc. v. Federal Power Commission*, *supra*, at p. 486. Moreover, the petition in this case did not even directly allege this legal conclusion. The petition merely states that petitioner would contend that the Board erred in denying it leave to intervene "for the reason" that it had a "substantial interest" in the temporary rate proceeding (*supra*, p. 3).

B. If it be assumed *arguendo* that deficiencies in the petition might be cured by the allegations of petitioner's reply to the motion to dismiss, we find that it is there alleged that the effect of the Board's order is to give financial aid to National's unlawful conduct in its relations with its employees, "thereby directly, substantially and adversely affecting the legal, statutory and property

rights" of these employees (R. 37), but the nature of the alleged injury is not stated. Only in the petition for certiorari is the injury specified. It states (Pet. 8-9) that the effect of the order is that "the power of the government has been injected into an economic contest between a labor organization and an employer, on the side of one contestant," and that "such a strengthening of one side works a weakening of the other, for the outcome of such contests generally depends upon the relative economic strength of the participants."

In fixing rates of compensation for air mail transportation, the Board acts pursuant to Section 406 of the Civil Aeronautics Act. That section alone determines the relevant issues in a mail pay rate proceeding, and the persons who may raise those issues. Admittedly, a Board order fixing air mail compensation does not impose any obligation on petitioner or its members. Such an order does not infringe upon any legal right of petitioner. *Alabama Power Co. v. Ickes*, 302 U. S. 464; *L. Singer & Sons v. Union Pacific R. R. Co.*, 311 U. S. 295. The question remains whether in such a proceeding the Board determines any issues which affect a substantial interest of the petitioner.

Under the Civil Aeronautics Act, the Board determines the rates of compensation for air mail transportation to be paid by the Postmaster General to the air carriers. Section 406 (a) pro-

vides that a proceeding to determine air mail compensation may be commenced by the Board upon its own initiative or upon the petition of the Postmaster General or an air carrier. It is made the Board's duty, after notice and hearing, to determine fair and reasonable rates of compensation. Section 406 (b) specifies the factors to be considered by the Board in determining the rate in each case. The specified factors are the facilities and services required of the carriers for the transportation of mail, the legal standards respecting the character and quality of service to be rendered by the carriers, "and the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense."

Although petitioner nowhere has alleged that the carrier has violated the Railway Labor Act or described any such violation, it refers to "compliance by the airline" with that Act as one of the substantive requirements of the Civil Aeronautics Act which the Board has failed to apply in determining temporary mail rates (Pet. 4-5, 7-9). But, even assuming a violation of the Railway Labor Act,

Section 406 (b) does not enumerate compliance with title II of the Railway Labor Act as a factor which must be considered by the Board in fixing air mail compensation. This omission is emphasized by the fact that Section 401 (e) (4) *does provide* that "It shall be a condition upon the holding of a certificate [of public convenience and necessity for one or more routes] by any air carrier that such carrier shall comply with title II of the Railway Labor Act, as amended." In brief, failure of a carrier to comply with title II of the Railway Labor Act is specifically made a ground for revocation or suspension of its certificate of public convenience pursuant to Section 401 (h). It should be noted that under Section 401 (h) a certificate may not be revoked unless the carrier fails to comply, within a reasonable time to be fixed by the Board, with the provision of the Act which the Board finds to have been violated. See also Section 9 (b) of the Administrative Procedure Act. Nothing in the Act suggests that failure to comply with the Railway Labor Act as such is to be translated from a ground for revocation of certificate into a decisive issue in a proceeding to determine air mail compensation.

Furthermore, nothing in Section 406 suggests that in a proceeding to fix rates of airmail compensation there are any necessary parties other than the Board; the Postmaster General and the

carrier. It is not the purpose of a Section 406 proceeding to do justice to everyone with whom the carrier has relationships. In such a proceeding, whether initiated on its own motion or upon petition of the Postmaster General or the carrier, it is the Board's duty to make a timely determination of the rates which, with non-mail revenues, will enable the carrier under honest, economical, and efficient management, to play its role in the development of air transportation adequate for the commerce of the United States, the Postal Service, and the national defense. There may be various employees, stockholders, creditors, competitors and commercial customers of a particular carrier who would question whether its management is honest, economical or efficient, or who would assert that it is entitled to increased or decreased mail compensation. However, no such person can initiate a mail rate proceeding—that right is limited by Section 406 (a) to the Board, the Postmaster General and the carrier concerned. If, therefore, neither a carrier's employees nor the labor union which represents them can initiate a proceeding to increase or decrease the carrier's rate of compensation for transporting mail, it is difficult to see why the commencement of a proceeding should have the effect of conferring upon petitioner an interest sufficient to give it the status of a party before the Board or to seek judicial review of the Board's action.

C. The Board's order for which petitioner seeks judicial review established *temporary* rates of compensation for the transportation of mail by National. The precise effect of this order and the nature of the considerations underlying its issuance by the Board, make it clear that, whatever petitioner's interest might be in an order establishing permanent rates, it is not a person entitled to obtain judicial review of a Board order establishing temporary rates.

When the Board determines a new rate of pay under Section 406 of the Act, it has normally made the new rate retroactive to the time when the rate proceeding was instituted. If the new rate is higher than the earlier one, there is a retroactive payment to the carrier; if the new rate is lower, there is recoupment from the carrier. The Board's temporary rate procedure arose from a combination of circumstances affecting air transportation during the past two years. Rapidly rising costs, falling load factors, and preparation for prospective traffic in substantial excess of that which materialized, had created a "serious financial condition" in the air transport industry which made it difficult or impossible for carriers to secure funds through sale of stock or borrowing on reasonable terms. Existing mail rates, which in a number of cases were "quite apparently inadequate," were depleting working capital and increasing the need for funds. It was impossible to determine new mail pay rates in

sufficient time to correct the "critical financial emergency" in which many carriers found themselves. The Board therefore established the policy of issuing a rate order in advance of its determination of the final rate, and this temporary rate was fixed at somewhat less than the Board's best estimate of the final rate. All such temporary rates were subject to retroactive adjustment so that in no event would a carrier be permitted to retain more than the amount "ultimately found to be proper upon the fixing of a permanent rate." (R. 21-22.)

In a temporary rate proceeding the only issues which the Board will consider are whether the carrier's "immediate financial position is critical" and whether its existing rate is "substantially inadequate." Injection of other issues into such a proceeding would subject it to all the delays inherent in determination of a final rate and would render the proceeding futile. Issues such as whether the carrier is under "honest, economical, and efficient" management remain open for determination in the proceeding to fix the carrier's new permanent rate. (R. 22-23.)

Inasmuch as the petitioner lacks the interest requisite to entitle it to be made a party to a proceeding under Section 406 to establish permanent rates, or to invoke judicial review of a Board order establishing such rates, it follows that petitioner has even less of an interest in a proceeding to establish temporary rates in which

the issues are sharply limited and in which the Board's action is entirely tentative. The "substantial interest" required by Section 1006 (a) to obtain review requires a showing that the Board's order has a direct adverse effect of a substantial character upon the petitioner, and it is not sufficient to show merely an indirect or speculative effect. *American Power and Light Co. v. Securities and Exchange Commission*, 325 U. S. 385, 388; *American Lecithin Co. v. McNutt*, 155 F. 2d 784, 786 (C. C. A. 2) certiorari denied, 329 U. S. 763.

Petitioner relies upon the statement in *Associated Industries v. Ickes*, 134 F. 2d 694, 704 (C. C. A. 2) that "Congress can constitutionally enact a statute conferring on any non-official person * * * authority to bring a suit to prevent action by an officer in violation of his statutory powers * * * even if the sole purpose is to vindicate the public interest." The short answer is that Congress in the Civil Aeronautics Act did not confer such authority, but expressly confined the right to judicial review of the Board's order to persons who disclose a "substantial interest" in the order for which review is sought. Further guidance as to the intent of Congress is found in a comparison of Section 406 (rates for transportation of mail) with other provisions of the Act. Section 406 refers only to the Postmaster General and to carriers. It is wholly silent as to the participation of other persons, whereas with respect to the Board's

general regulatory powers and duties many provisions of the Act explicitly recognize the interest therein of third persons. Provision is made for notice to interested persons of applications for certificates of public convenience and necessity,⁴ applications for foreign air carrier permits,⁵ applications for approval of consolidations, mergers, purchases, leases, operating contracts, and acquisitions of control;⁶ and public hearing is specifically required with respect to such applications.⁷ "Interested persons" are also given the right to support or protest modifications, amendments, suspensions and revocations of certificates⁸ and permits,⁹ or abandonments of service.¹⁰

Reference has already been made to the Board's power under Section 401 (h) "upon petition or complaint or upon its own initiative, after notice and hearing," to suspend or revoke a certificate of public convenience and necessity for violation of the Act. That subsection further provides that "Any interested person may file with the Board a protest or memorandum in support of or in opposition to the * * * suspension, or revocation of a certificate." The contrast

⁴ Section 401 (b), 49 U. S. C. 481 (b).

⁵ Section 402 (d), 49 U. S. C. 482 (d).

⁶ Section 408 (b), 49 U. S. C. 488 (b).

⁷ Section 401 (c), 49 U. S. C. 481 (c); Section 402 (e), 49 U. S. C. 482 (e); Section 408 (b), 49 U. S. C. 488 (b).

⁸ Section 401 (h), 49 U. S. C. 481 (h).

⁹ Section 402 (g), 49 U. S. C. 482 (g).

¹⁰ Section 401 (k), 49 U. S. C. 481 (k).

between these provisions and those of Section 406, coupled with the fact that Section 401 (e) (4) makes compliance with title II of the Railway Labor Act "a condition upon the holding of a certificate," strongly suggests that Section 401 (h) constitutes the exclusive remedy under the Civil Aeronautics Act for carrier employees asserting violation of the Railway Labor Act. Petitioner has, in fact, invoked such remedy by instituting a complaint, upon which the Board has not yet acted, charging National with failure to comply with the condition prescribed by Section 401 (1) (4). *In the matter of compliance with Section 401 (1) (4) of the Civil Aeronautics Act of 1938 by National Airlines, Inc.*, Docket No. 3298, complaint filed March 25, 1948.

The petitioner also contends that it is entitled to obtain judicial review of the Board's order by reason of Section 10 (a) of the Administrative Procedure Act, which provides that "Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof." Specifically, petitioner asserts that it is a person "suffering legal wrong" because of, and one "adversely affected or aggrieved by", the Board's order. Section 10 (a) was intended to restate existing law in general terms.¹¹ In fact, the

¹¹ Hearings, House Committee on the Judiciary, on Federal Administrative Procedure, 79th Cong., 1st Sess. (1945), p. 38; S. Rep. 752, 79th Cong., 1st Sess. (1945), p. 44.

phrase "any person suffering legal wrong" is used as a limitation, rather than for the purpose of making judicial review available to anyone adversely affected, no matter how indirectly, by governmental action.¹² The Attorney General specifically advised the Senate Committee on the Judiciary that Section 10 (a) as finally enacted was intended to embody the rule of such cases as *Alabama Power Co. v. Ickes*, *supra*.¹³ Thus, under Section 10 (a), as under Section 1006 (a) of the Civil Aeronautics Act, the right to obtain judicial review of an order of the Board is available only to one who can show injury to a substantial personal interest—an interest protected by law against the type of injury alleged to result from that order. For the reasons previously stated, petitioner has no interest in the Board's action pursuant to Section 406 of the Civil Aeronautics Act which entitles him to judicial review under Section 10 (a) of the Administrative Procedure Act.

II

The court below did not pass upon the contention made by both the Board and National that the petition should be dismissed for the reason that the Board's rate order was only an interim order not

¹² Compare the language of Section 10 (a) as enacted, with the original provision in S. 7, 79th Cong., 1st Sess., as follows: "Any person adversely affected by any agency action shall be entitled to judicial review thereof in accordance with this section."

¹³ S. Rep. 752, 79th Cong., 1st Sess., p. 44.

possessing that degree of finality required for purposes of judicial review (R. 13-14, 93). If certiorari should be granted, the respondents would be free to support the judgment of dismissal upon the foregoing ground.¹⁴ We have directed the Court's attention to that contention and to the portion of the record where it is set forth in the event that this Court should wish to consider it in determining whether certiorari should be granted or denied.

CONCLUSION

The decision below is correct and there is no conflict of decision. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

✓ PHILIP B. PERLMAN,
Solicitor General.

HERBERT A. BERGSON,
Assistant Attorney General.

CHARLES H. WESTON,
Special Assistant to the Attorney General.

✓ EMORY T. NUNNELEY, Jr.,
General Counsel,

O. D. OZMENT,
Attorney, Civil Aeronautics Board.

JULY 1948.

¹⁴ *Langnes v. Green*, 282 U. S. 531, 538; *Helvering v. Gowran*, 302 U. S. 238, 245; *LeTulle v. Scofield*, 308 U. S. 415, 421.

APPENDIX

CIVIL AERONAUTICS ACT OF 1938, AS AMENDED¹

SEC. 406. (a) The Board is empowered and directed, upon its own initiative or upon petition of the Postmaster General or an air carrier, (1) to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith * * * by each holder of a certificate authorizing the transportation of mail by aircraft, and to make such rates effective from such date as it shall determine to be proper; * * *. [49 U. S. C. 486 (a).]

(b) * * * In determining the rate in each case, the Board shall take into consideration, among other factors, the condition that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing necessary and adequate facilities and service for the transportation of mail; such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law; and the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air

¹ Act of June 23, 1938, 52 Stat. 973, Reorg. Plan No. IV, Sec. 7, effective June 30, 1940, 5 Fed. Reg. 2421, 54 Stat. 1235 (49 U. S. C. 401 *et seq.*).

carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense. [49 U. S. C. 486 (b).]

SEC. 1006. (a) Any order, affirmative or negative, issued by the Board under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore. [49 U. S. C. 646 (a).]

ADMINISTRATIVE PROCEDURE ACT ²

SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) Right of Review.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof. [49 U. S. C. 1009.]

² Act of June 11, 1936, 60 Stat. 237 (5 U. S. C. 1001 *et seq.*).

Am

Civ

On

BRI

Cum

FILE COPY

Office - Supreme Court
FILED

JUL 10 1948

N 86

CHARLES ELMORE
CL

IN THE
Supreme Court of the United States

OCTOBER TERM, 1947.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, *Petitioner,*

v.

CIVIL AERONAUTICS BOARD AND NATIONAL AIRLINES, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the District of Columbia.

**BRIEF FOR NATIONAL AIRLINES, INC., RESPON-
DENT, IN OPPOSITION.**

✓ JOHN W. CROSS,
✓ MAC ASBILL,
/ RICHARD A. FITZGERALD,
Attorneys for Respondent,
National Airlines, Inc.

CUMMINGS, STANLEY, TRUITT & CROSS,
Of Counsel.



INDEX.

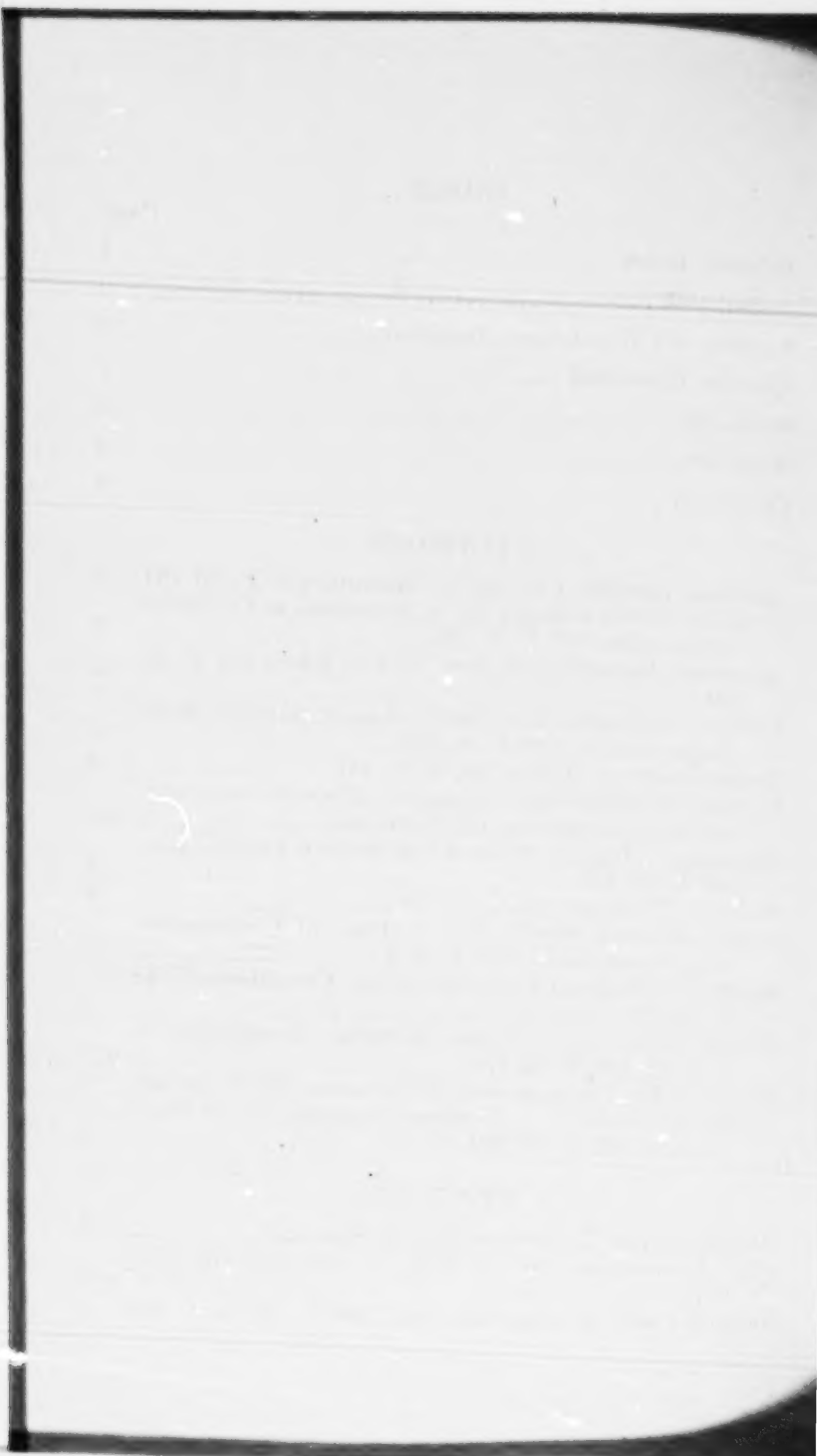
	Page
Opinions Below	1
Jurisdiction	2
Statutes and Regulations Involved.....	2
Question Presented	2
Statement	2
Argument	4
Conclusion	8

CITATIONS.

American Lecithin Co., Inc. v. McNutt, 155 F. 2d 784	5
American Power & Light Co. v. Securities & Exchange Commission, 325 U. S. 385.....	7
Associated Industries of New York v. Ickes, 134 F. 2d 694	7
Federal Communications Commission v. Sanders Bros. Radio Station, 309 U. S. 470.....	6
Massachusetts v. Mellon, 262 U. S. 447.....	4
National Broadcasting Company v. Federal Communi- cations Commission, 132 F. 2d 545.....	5, 6
Oklahoma v. United States Civil Service Commission, 330 U. S. 127	6
Parker v. Fleming, 329 U. S. 531.....	6
Scripps Howard Radio, Inc. v. Federal Communica- tions Commission, 316 U. S. 4.....	6
Simmons v. Federal Communications Commission, 145 F. 2d 578	5
United States Cane Sugar Refining Association v. McNutt, 138 F. 2d 116.....	6, 7
Virginian Ry. Co. v. System Federation, 300 U. S. 515	8
Yankee Network Inc. v. Federal Communications Com- mission, 107 F. 2d 212.....	5

STATUTES.

Administrative Procedure Act, 60 Stat. 237.....	2, 3, 5
Civil Aeronautics Act of 1938, as amended, 52 Stat. 977	2, 3, 4, 8
Judicial Code, as amended, Sec. 240(a), 43 Stat. 938	2



IN THE
Supreme Court of the United States

OCTOBER TERM, 1947.

No. 858.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, *Petitioner,*

v.

CIVIL AERONAUTICS BOARD AND NATIONAL AIRLINES, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the District of Columbia.

**BRIEF FOR NATIONAL AIRLINES, INC., RESPON-
DENT, IN OPPOSITION.**

OPINIONS BELOW.

The Court below rendered no opinion other than the judgment and decree of April 23, 1948 (R. 96). The Order of the Civil Aeronautics Board which Petitioner sought to have reviewed is not yet reported; but appears at page 25 of the record.

JURISDICTION.

The jurisdiction of this Court is invoked by the Petitioner under Section 1006 (f), of the Civil Aeronautics Act of 1938, as amended (52 Stat. 977, 1025, 49 U. S. C. § 646 (f)), Section 240 (a) of the Judicial Code, as amended (28 U. S. C. § 347) and Rule 38, Paragraph 5 (c) of the Court.

STATUTES AND REGULATIONS INVOLVED.

The pertinent provisions of the Civil Aeronautics Act as amended (52 Stat. 977, 49 U. S. C. § 401, 402, 481, 486, 642, 646) are set forth on pages 11-12 of the Appendix to the petition for certiorari.

The pertinent provisions of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. § 1001, *et seq.*) are set forth at pages 12-13 of the Appendix to the petition for certiorari.

QUESTION PRESENTED.

Whether a labor union representing employees of an air carrier has "substantial interest" in, or suffers any "legal wrong" from or is "adversely affected or aggrieved" by an order of the Civil Aeronautics Board, fixing temporary mail rates to be paid by the Government to the air carrier to permit its continued operation, so as to give the union the right to judicial review of the order under Section 1006(a) of the Civil Aeronautics Act or Section 10 (a) of the Administrative Procedure Act? The former Act permits judicial review upon petition by any person disclosing a "substantial interest" in such order, and the latter Act permits judicial review by any person suffering a "legal wrong" or "adversely affected or aggrieved" by administrative action.

STATEMENT.

The Petitioner is a labor union representing pilots in the employ of Respondent, National Airlines, Inc. ("National"). On February 3, 1948, the Petitioner ordered a

strike of National's pilots. The strike is still in effect and National is carrying on its operations with pilots who refused to strike and with newly employed pilots.

On April 5, 1948, Petitioner filed a petition (R. 1) to the United States Court of Appeals for the District of Columbia seeking review and stay of an order of the Civil Aeronautics Board ("the Board") (R. 25) which fixed and determined fair and reasonable temporary rates of compensation for transportation of mail by aircraft pending the determination of permanent rates of compensation.

The Board's order fixing the temporary rate expressly finds, (1) that National's financial position is critical and the failure to grant a temporary rate may hamper its ability to perform the services required by public convenience and necessity; (R. 26), (2) that the present mail rate fails to meet its (National's) operating requirements (R. 26); (3) that a final rate could not be established in time to provide the immediate relief required (R. 26). The Order expressly provided that the proceeding would remain open pending entry of a final order which may be higher or lower than the temporary rate fixed in the order (R. 25, 31).

The petition for review was based on the contentions (1) that the order was issued in violation of the terms of the Civil Aeronautics Act; (2) that Petitioner was deprived of a fair hearing as required by the 5th Amendment to the Constitution, Section 1001 of the Civil Aeronautics Act and Sections 7 and 8 of the Administrative Procedure Act.

Section 1006 (a) of the Civil Aeronautics Act of 1938, as amended (52 Stat. 977, 49 U. S. C. § 646) provides that orders of the Board shall be subject to review by the United States Court of Appeals for the District of Columbia upon petition " * * * by any person disclosing a substantial interest in such order". Section 10 (a) of the Administrative Procedure Act provides that " * * * Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."

The petition for review (R. 1) contained no allegations of fact or other allegations disclosing (a) that it had a "substantial interest" in the order sought to be reviewed or (b) that it was a person "suffering legal wrong" or "adversely affected or aggrieved" by the Board's action.

Petitioner actually has no interest in the subject order and is not a person suffering legal wrong because of the order, nor is it adversely affected or aggrieved by such order. The Petitioner's concern with the order is at best speculative, remote, conjectural and indirect. The action of the Board in determining that National should be paid an increased rate of compensation for transporting the mail had no reasonably direct effect upon the Petitioner. None of the funds involved were paid by or taken away from the Petitioner. The rate fixed is compensation for the transportation of mail to be paid by the Government. The Petitioner makes no contribution to such payments except incidentally as a taxpayer.¹

Any effect which the Board's order might have upon the status of the labor dispute between the Petitioner and National is highly conjectural and remote. The Board's findings support the position that the failure to grant interim relief would actually prevent National from re-employing the pilots represented by Petitioner since National might be unable to continue its operations without a temporary increase in its rate of compensation for the transportation of the mail.

ARGUMENT.

1. The issue before the Court is whether Petitioner disclosed to the United States Court of Appeals for the District of Columbia a "substantial interest" under ¶ 1006(a) of the Civil Aeronautics Act in the order of the Civil Aeronautics Board which it sought to have reviewed. The

¹ Although it is clear that such an interest cannot support a petition on appeal, *Massachusetts v. Mellon*, 262 U. S. 447 (1923), the Petitioner has not even shown that it is a taxpayer.

Petitioner (R. 1-5) failed to disclose such an interest in its petition for review. It further failed to disclose such an interest in the other pleadings filed with the Court below. Further, Petitioner actually has no interest in the order which entitles it to the right of appeal.

The petition is devoid of factual allegations disclosing that the Petitioner is a "person suffering legal wrong" or "is adversely affected or aggrieved" within the meaning of section 10(a) of the Administrative Procedure Act. (60 Stat. 237)

A Petitioner's appealable interest must appear from the notice of appeal and the statement of reasons therefor. *National Broadcasting Co. v. Federal Communications Commission*, 132 F. (2d) 545, 548 (1942) (Affirmed 319 U. S. 239); *Yankee Network, Inc. v. Federal Communications Commission*, 107 F. (2d) 212, 224, 225 (App. D. C., 1939). Aside from the failure to allege facts, showing a substantial interest, Petitioner does not even state the legal conclusion that it has a substantial interest except by inference (R. 1-5).

Aside from its failure to state facts in its petition showing an appealable interest, Petitioner failed to disclose a substantial interest in the order during subsequent phases of the proceedings before the Court below. (See R. 33-61.) The contention that the Petitioner will be adversely affected or aggrieved by reason of the temporary adjustment in National's rate of mail compensation is highly speculative, indirect and remote. It complains not that the Petitioner has been deprived of any right, but that National has been granted something which may enable it to refuse to comply with the Petitioner's demands. Such an indirect and speculative interest does not constitute a "substantial interest" nor does it meet the test that the Appellant be a person who is adversely affected or aggrieved by the order. *American Lecithin Co., Inc. v. McNutt*, 155 F. (2d) 784 (CCA-2, 1946); *Simmons v. Federal Communications Commission*, 79 U. S. App. D. C. 264, 145 F. (2d) 578, (App.

D. C., 1944); *United States Cane Sugar Refiners Assn. v. McNutt*, 138 F. (2d) (CAA-2, 1943); cf. *Oklahoma v. United States Civil Service Commission*, 330 U. S. 127, 136-137 (1947); *Parker v. Fleming*, 329 U. S. 531 (1947).

The Petitioner's contentions that it has a "substantial interest"; that it is a person "suffering legal wrong" because of the Board's order, and that it is "adversely affected or aggrieved" by such order are not supported by the allegations of fact contained in the petition nor by the authorities cited. The decisions of this Court and of the Circuit Courts of Appeals establish that, " * * * The adverse effect must be a result that is not only *reasonably* sure to follow the enforcement of the regulations but will be something more than nominal or highly speculative." *United States Cane Sugar Refiners Assn. v. McNutt*, *supra*, at page 120. The cases cited by Petitioner establish the right of persons whose interests are *directly affected* to appeal on the ground that they are "adversely affected or aggrieved" but those cases do not abolish the requirement that the adverse effect must be reasonably direct and definite as distinguished from the remote and speculative interest advanced by the Petitioner on this case.

In the cases cited by Petitioner (Petition, p. 9), the moving parties were directly and definitely affected by the challenged orders. In *Federal Communications Commission v. Sanders Bros. Radio Station*, 309 U. S. 470, the Petitioner was directly financially interested because of the establishment of a competitive radio station serving an area which presumably could not economically support more than one station. In *Scripps Howard Radio, Inc. v. Federal Communications Commission*, 316 U. S. 4, the question of standing to appeal was not in issue. There the issue was the power of the Court to stay an order pending appeal. In that case, however, the effect of the order upon the appellant was direct since the order prevented appellant from serving a substantial part of its listening audience by reason of electrical inter-

ference. Cf. *National Broadcasting Co. v. Federal Communications Commission*, *supra*. In *American Power & Light Co. v. S. E. C.*, 325 U. S. 385, the order had a direct adverse effect upon the appellant as a stockholder of a corporation since it compelled the transfer of certain items from the surplus account to another account where it was not available for payment of dividends to appellant. In *Associated Industries of New York v. Ickes*, 134 F. (2d) 694 (CCA-2, 1943), the appellants were substantial consumers of coal and the challenged orders directed an increase in the minimum price of coal in the area where appellants were located. The effect of the order upon appellants was immediate and direct. The facts in the *Associated Industries* case were expressly distinguished by the same Second Circuit in *United States Cane Sugar Refiners v. McNutt*, *supra*, where the Court stated (p. 120):

"The instant case * * * does not fall readily into what we conceive to be the meaning of the term 'adversely affected' in the light of the principles relied on in our *Associated Industries* case. The supposed adverse effect is one which leaves the petitioners' produce free of all restriction. The *petitioners* are 'adversely affected' only in that their competitors are not hampered more. But though such a relationship to the subject matter of the regulations may be enough in some instance which does not now come to mind, it can only be so when the adverse effect of the regulations, present or future, is 'of sufficient immediacy and reality.' *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U. S. 270, 61 S. Ct. 510, 512, 85 L. Ed. 826. The adverse effect must be a result that is not only reasonably sure to follow the enforcement of the regulations but will be 'something more than nominal or high speculative.' *National Broadcasting Co. v. Federal Communications Commission*, 76 U. S. App. D. C. 238, 132 F. 2d 545, 548." (Emphasis supplied)

2. The question presented by this petition involves no important or significant issue for decision. The Petitioner's interest is clearly remote and speculative and is

of a type which has uniformly been held insufficient to create a legal standing to challenge a decision of an administrative tribunal.

The sole issue before the Court is whether the Petitioner has legal standing to appeal the order of the Civil Aeronautics Board. The allegation that the petition involves a substantial question directly affecting the public interest is untrue and, besides, furnishes no basis for Petitioner to appeal. The contention that the Petitioner is protecting the public interest (Petition, pp. 6-7) is not established. No rights of Petitioner under the Civil Aeronautics Act or the Railway Labor Act are impaired by the Board's order. Such rights as Petitioner may have under these acts are directly enforceable in the courts. *Virginian Ry. Co. v. System Federation*, 300 U. S. 515; Civil Aeronautics Act of 1938, Sec. 1107; 49 U. S. C. § 647.

The interest of the Petitioner falls so far short of creating a legal standing to appeal that a decision in this case would not make any significant contribution to existing law.

CONCLUSION.

The decision below was correct. We respectfully submit that the petition for a writ of certiorari should be denied:

JOHN W. CROSS,
MAC ASBILL,
RICHARD A. FITZGERALD,
1625 K Street, N. W.,
Washington 6, D. C.,
Attorneys for Respondent,
National Airlines, Inc.

CUMMINGS, STANLEY, TRUITT & CROSS,
Of Counsel.

July , 1948.